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Higher Education

Opportunities for Foreign Education Institutes in India

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According to the India Brand Equity Foundation, India's higher education system is the largest in the world enrolling over 70 million students. In less than two decades, the nation has managed to create an additional capacity for an overwhelming 40 million more students. The higher education sector also witnesses a spending of over INR 46,200 crore (USD 6.93 billion).[1]

To meet the growing demands, the higher education sector in India has witnessed a paradigm shift in recent times. Until few years back, the sector was primarily focused on certain home grown institutions like the Indian Institutes of Technology (IITs) and the Indian Institutes of Management (IIMs). However, in the past few years, there has been an increase in the participation of domestic and global providers in this sector.

India still lags behind in the quality of its higher education institutions and this is seen as a big opportunity for global participation. There has been an increase in the demand for education programmes offered by global institutions, which tend to offer a curriculum that reflects latest trends, and imparts new age learning. The use of latest teaching methods and technology in imparting education and skill based learning are aimed at making the students employable. Thus, these courses are well received by the students.

In order to encourage foreign participation, several initiatives have been and/or are being taken by the Indian government. Foreign Direct Investment (**"FDI"**) up to 100% is allowed under the automatic route in the education sector in India. According to the data released by Department of Industrial Policy and Promotion (**"DIPP"**) from April 2000 to June 2017, the education sector received FDI of a total of USD1465.44 million.[2] Investment in the higher education space is particularly considered to have a great potential. India's Gross Enrollment Ratio (**"GER"**) in higher education currently is 24.5%[3] and the target of the government is to increase it to 30% by 2020.[4] Thus, the Indian education sector offers good opportunities for foreign providers in this sector.

In addition to this, even amongst the private providers, efforts are being taken to encourage development of strong collaborations between well-established foreign universities and Indian universities in order to facilitate greater academic exchange among students.

As a further impetus to the higher education sector, the Government of India has recently approved the regulatory architecture for setting up / upgrading 20 *Institutions of Eminence in the country*.[5] Institution of Eminence is an initiative by the Government to set up or recognize existing higher educational institutions in India as world class teaching and research institutes. This step is specifically taken so as to enable Indian institutions/universities to make its mark amongst the top 100 of world institutions ranking and also to get global recognition. On September 13, 2017, the Government invited applications from various institutions/ universities to obtain recognition as Institution of Eminence and around 100 Indian educational institutes/universities have applied for the same. As of now 10 public and 10 private institutions will be recognized as Institutions of Eminence. These institutes are to have greater autonomy

1. https://www.ibef.org/industry/education-sector-india.aspx , (last visited on January 11, 2018).

2. Fact sheet on FDI from April, 2000 to June 2017, available at http://dipp.nic.in/sites/default/files/FDI_FactSheet_June2017_2_0.pdf (last visited on January 11, 2018).

3. All India Survey on Higher Education (2015-2016), available at: http://mhrd.gov.in/sites/upload_files/mhrd/files/statistics/AISHE2015-16.pdf (last visited on January 11,

4. .R. Madhavan & Kaushiki Sanyal, "Regulation in the Education Sector", available at http://www.idfc.com/pdf/report/2012/Chapter_1.pdf (last visited on January 11, 2018).

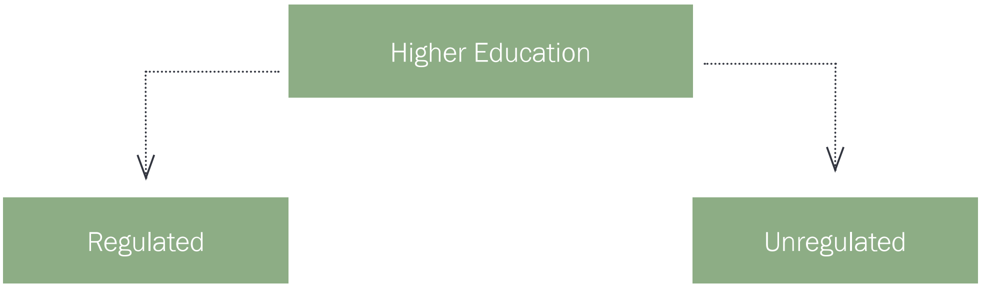
5. See https://www.ugc.ac.in/pdfnews/4523868_Press-release-IoE-final.pdf (last visited on January 11, 2018).

with respect to admission of foreign students, recruitment of foreign faculty, and can enter into academic collaboration with top 500 higher educational institutes in global ranking, without any permission from the Government or University Grants Commission (**"UGC"**).

In this paper, we have discussed some of the structuring options available to foreign educational institutes (**"FEI"**) for doing business in the education sector in India. We have also discussed the key regulatory and tax concerns involved in such structuring.

1. Broad overview of regulatory framework governing the education sector in India

The higher education segment in India is typically divided in two broad segments:



I. Regulated Sector

This segment includes:

- bachelor's/undergraduate degree courses
- master's/post-graduate degree courses
- diploma courses
- pre-doctoral/ doctoral programmes

As per the University Grants Commission Act, 1956 (**"UGC Act"**), the right of conferring or granting degrees can be exercised only by a university or an institution deemed to be a university.[6] The UGC Act stipulates the criteria for qualifying as universities, deemed universities and has provisions relating to the pre-requisites / eligibility for grant of degrees.

A. Technical and Non- Technical courses

The regulated sector can be further sub-categorized broadly into technical and non-technical education courses.

- *Technical courses:* 'Technical Education' has been defined in the All India Council for Technical Education Act, 1987 (**"AICTE Act"**) to mean *"programmes of education, research and training in engineering technology, architecture, town planning, management, pharmacy and applied arts and crafts and such other programme or areas as the Central Government may, in consultation with the AICTE, by notification in the Official Gazette, declare".*[7] The All India Council for Technical Education (**"AICTE"**) oversees technical education and the functioning of technical institutions within the country. 'Technical Institution', under the AICTE Act, refers to the institutions, other than universities, conducting the courses or programmes in the field of Technical Education. Courses in technical programmes cannot be offered without prior permission of the AICTE.[8]
- *Non-technical courses:* Non-technical education refers to courses other than technical courses. To the extent they lead to the award of a degree, diploma, etc., they are regulated by the UGC.

B. Professional councils

Statutory professional councils regulate certain professional courses in the country. They are

6. Section 22 of the UGC Act.

7. Section 2(g) of the AICTE Act.

8. Section 2(h) of the AICTE Act.

responsible *inter alia* for recognition of courses, promotion of professional institutions and providing grants for programmes. The Medical Council of India, for instance, is empowered to prescribe minimum standards for medical education required for grant of recognized medical qualifications by universities or medical institutions in India. It is also responsible to give its recommendations to the Government for establishing new medical colleges. Similarly, Bar Council of India, Dental Council of India, Indian Nursing Council, etc., are some of the notable councils. These councils have been empowered to prescribe standards and formulate regulations with respect to their field of involvement.

C. Distance Education Board

In addition to the in-person education offered through colleges and universities, the distance education sector also forms part of the formal education system in India. It was initially governed by the Distance Education Council (**"DEC"**) which was set up under the Indira Gandhi National Open University Act, 1985. However, in May 2013, the DEC was dissolved.[9] Subsequently, in May 2013, the Government, issued a notification transferring DEC's responsibilities to the UGC.[10] Vide notification dated June 17, 2013, the UGC adopted the Guidelines of the DEC on Minimum Requirements for recognition of Open and Distance Learning (**"ODL"**) institutions, till such time the UGC frames regulation for ODL institutions.[11]

On June 23, 2017, the UGC notified the University Grants Commission (Open and Distance Learning) Regulations, 2017 (**"ODL Regulation 2017"**), setting out minimum standards of instructions required for granting degrees (undergraduate and post-graduate levels) through ODL mode[12].[13] These regulations are only applicable to all degree programmes (other than programmes in technical courses, medical, dental, pharmacy and any programme which is not permitted to be offered in distance mode by regulatory body) offered by universities and institutions deemed to be universities.[14] The key conditions under the regulations include the following:

- higher educational institutions already offering[15] or intending[16] to offer programmes in ODL mode from the academic session 2018-19 and onwards have to seek approval for recognition from the UGC;
- in order to be recognized the higher educational institutions should have valid accreditation from National Assessment and Accreditation Council (**"NAAC"**) and complete five years of existence;[17]
- permission to offer distance education programme in ODL mode will be granted course wise and prior permission is required with respect to each courses to be offered in ODL mode;
- higher education institution can offer up to 20% of the total course being offered in each programme in a semester through online learning courses / massive open online course;[18]

9. See https://www.ugc.ac.in/deb/MHRDLetter-16thMay2013.pdf (last visited on January 11, 2018).
10. See https://www.ugc.ac.in/deb/MHRDLetter-16thMay2013.pdf (last visited on January 11, 2018).
11. See https://www.ugc.ac.in/deb/notices/UGCNotification-17thJune2013.pdf (last visited on January 11, 2018).
12. Regulation 2(m) of the ODL Regulation 2017, defines "*Open and Distance Learning*" mode as a mode of providing flexible learning opportunities by overcoming separation of teacher and learner using a variety of media, including print, electronic, online and occasional interactive face-to-face meetings with the presence of an Higher Educational Institution or Learner Support Services to deliver teaching-learning experiences, including practical or work experiences.
13. Regulation 1(1) of the ODL Regulation 2017, available at https://www.ugc.ac.in/oldpdf/regulations/distance%20education%20regulations.pdf (last visited on January 11, 2018).
14. Regulation 1(3) of the ODL Regulation 2017.
15. Regulation 3(1) of the ODL Regulation 2017.
16. Regulation 3(2) of the ODL Regulation 2017.
17. Regulation 3(1)(viii) of the ODL Regulation 2017.
18. Regulation 10(2) of the ODL Regulation 2017.

- the higher educational institution other than an Open University[19] is offering similar programme in the conventional mode of classroom teaching;[20]
- higher educational institutions have to establish a centre for internal quality assurance exclusively for programmes to be offered in ODL mode within 1 year from these regulations come into force;[21]
- higher educational institutes can fix the fee structure for its courses but the same has to be declared in its prospectus for admission and on the website.[22]

Further, with respect to deemed universities, the ODL Regulation 2017 specifically states that:[23]

- an institute declared to be deemed to be university after May 26, 2010 is not allowed to conduct courses in the distance education mode;
- institute declared to be deemed to be university before May 26, 2010 is not allowed to conduct courses in distance mode from any of its off-campus centres or off-shore campuses approved after 26th May, 2010;
- that a deemed to be university can operate only through its headquarters or from Government approved off-campus or off-shore campuses;
- approval for new courses and extension of approval of the courses already run by the deemed to be university under the distance mode would be granted by the UGC, subject to fulfillment of conditions laid down by the UGC.

II. Unregulated Sector

The unregulated sector primarily comprises of:

- certification courses not leading to the award of a degree or diploma
- vocational training
- tutoring services / coaching classes
- online education programmes

In the recent past, skill based courses, certification programmes, vocational training and tutoring have garnered interest amongst education service providers. This is because a significant percentage of students graduating from universities and colleges are not readily employable because of lack of skills. This results in students enrolling in coaching classes / vocational training classes and seeking certification courses to increase their scope of employability.

Another new space of growth is the online education sector, which is witnessing investments, and entry of new providers through new initiatives and acquisitions. Since the programmes are offered online, and are at times self-paced, it is also preferred by students who are unable to access physical centres. As per a report published by KPMG, India's online education industry is expected to grow almost eight times to hit $1.96b by 2021. The paid user is expected to increase from ~1.6m users in 2016 to ~9.6m in 2021.[24]

Some prominent examples of investments and initiatives between 2014- 2017 are :[25]

19. Regulation 2(n) of the ODL Regulation 2017 defines *"Open University"* as a University which imparts education through distance education or Open and Distance Learning mode using variety of Information and Communication Technology educational aids i.e. online education in the form of Open Educational Resources (OERs) or Massive Open Online Courses (MOOCs)etc.
20. Regulation 3 (1)(iii) of the ODL Regulation 2017.
21. Regulation 8(1)(i) of the ODL Regulation 2017.
22. Regulation 12(1)(a)(i) of the ODL Regulation 2017.
23. Annexure IV, Part B of the ODL Regulation 2017.
24. Online Education In India : 2021, A study by KPMG in India and Google, published on May 2017, available at https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/Online-Education-in-India-2021.pdf (last visited on January 11, 2018).
25. Trends in the online education sector in 2014, available at http://www.medianama.com/2015/01/223-trends-in-the-online-education-sector-in-2014/ (last visited on January 11, 2018).

- In 2016, Byju's - an ed-tech start up, raised USD 50 million from Mark Zuckerburg's initiative alongwith through other existing investors.[26]
- In 2017, Byju's further raised about USD 30 million from a Belgian family office Verlinvest and around USD 35 million from a Chinese Internet conglomerate Tencent Holdings.[27]
- In January 2017, Cuemath – a math learning startup, raised USD 15 million in a Series B round from Capital G (formerly known as Google Capital) and exiting investor Sequoia India.[28]
- In September 2017, Unacademy – an exam preparation startup, raised around USD 11.5 million in a Series B round led by Sequoia Capital India and SAIF Partners. [29]
- In October 2017, Toppr – a learning app for students for classes 5th to 12th, raised USD 7 million in a Series B funding round from existing investors such as SAIF Partners, Helion ventures and FIL Capital Management.[30]
- Springboard raised USD 9.5 million in a Series A funding round led by US based early stage venture capital firm Castanoa Ventures.[31]
- Tata Trusts, part of the Tata Group, have entered into a strategic partnership with Khan Academy, which is a free e-learning portal.[32]
- Neev Knowledge Management Pvt. Ltd., which operates under the brand EduPristine and offers online and classroom- based certification, raised USD 10 million from a private equity fund and US- based education company.[33]

Keeping with the trend, various Massive Open Online Course (**"MOOC"**) initiatives have been started by universities and colleges, and by the Indian government as well. Some examples of MOOCs are:

- Birla Institute of Technology and Science (BITS) Pilani, IIT Bombay and IIM Bangalore have partnered with the MIT & Harvard's MOOC platform edX to offer MOOCs to their on-campus and off-campus students.
- As a government initiative, the Union Human Resource Development (**"HRD"**) Ministry had initiated its MOOC platform called SWAYAM, where professors of centrally funded institutions will offer online courses free of cost. SWAYAM was launched in 2016, with the goal to introduce over 350 new online degree, diploma, certification and other course such as MOOCs on this platform. The course offered through SWAYAM are regulated under the UGC (Credit Framework for Online Learning Courses through SWAYAM) Regulations, 2016 (**"SWAYAM Regulations"**).[34] The Swayam Regulations provide for credit mobility for credits earned through online learning courses through SWAYAM in the credit programme of educational institutions.[35] The union cabinet

26. See http://www.thehindu.com/business/Industry/Mark-Zuckerberg's-philanthropic-arm-invests-in-Byju's/article14628588.ece (last visited on January 11, 2018).
27. See https://www.vccircle.com/flashback-2017-ed-tech-startups-get-a-tough-funding-lesson/ (last visited on January 11, 2018).
28. *Ibid*
29. *Ibid*
30. *Ibid*
31. *Ibid*
32. See http://www.livemint.com/Companies/mfq01bHDBY2alF8BFkCOyM/Tata-Trusts-enter-into-strategic-partnership-with-Khan-Acade.html (last visited on January 11, 2018).
33. See http://www.livemint.com/Companies/h2NkW9uvGCYmKjWrraUFhP/EduPristine-raises-10-million-in-a-second-funding-round.html (last visited on January 11, 2018).
34. See http://www.ugc.ac.in/pdfnews/0272836_moocs.pdf (last visited on January 11, 2018).
35. Regulation 6, SWAYAM Regulations, available at https://www.ugc.ac.in/pdfnews/4064990_UGC-(Credit-Framework-for-Online-Learning-Courses-through-SWAYAM)-Regulation,-2016.pdf (last visited on January 11, 2018).

also approved the signing of a declaration of intent with the U.S. Department of State for US universities to offer post-graduate academic programmes with certification on the SWAYAM platform.[36] Further, technical education can also be provided through SWAYAM platform as per the AICTE Regulation (Credit Framework for online learning course through SWAYAM) Regulation, 2016.[37]

36. See http://pib.nic.in/newsite/PrintRelease.aspx?relid=109984 (last visited on January 11, 2018).

37. See http://www.old.aicte-india.org/downloads/171415.pdf#toolbar=0 (last visited on January 11, 2018); See http://nptel.ac.in/LocalChapter/swayam/AICTE%20Credit%20Notification.pdf (last visited on January 11, 2018).

2. Operation of FEIs in the regulated sector

Currently, FEIs are not permitted to establish an independent campus in India for the purpose of degree programmes. As a step towards liberalization of the heavily regulated higher education sector, the government on September 10, 2013 had issued a press release[38] informing various stake-holders about its proposal to allow foreign universities to set up campuses in India as not-for-profit companies (without having to collaborate with domestic educational institutions). However, no action has been taken on this front as of now. Further, a bill titled 'The Foreign Educational Institutions (Regulations of Entry and Operations) Bill, 2010'[39] was introduced in the parliament to regulate entry and operation of FEIs in India to impart higher education. However, the bill lapsed in 2014. In 2016, Niti Aayog have submitted a report to the Prime Minister and the Human Resource Development Minister, calling for the invitation of foreign universities to set up campuses in India and their operations should be controlled by law, since the same will help meet the demand for higher education in the country, increase competition and subsequently improve standards of higher education. [40]However, currently, the only way FEIs can enter the regulated sector is by way of collaboration with Indian educational institutes.

Both the AICTE and the UGC have their own set of regulations to govern the operation of FEIs.

I. AICTE Regulations[41]

The AICTE Regulation for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India, 2005 (**"AICTE Regulations"**) facilitate the entry of FEIs in India by way of collaboration with Indian educational universities/institutions for imparting technical education leading to the award of diplomas, degrees, etc. This is subject to satisfaction of prescribed conditions and obtaining registration from the AICTE. The registration is granted for a period specified at the time of registration. Key conditions under the regulations include the following:

- the FEI has to be approved and accredited with higher grades in its home country;[42]
- the Indian educational institution has to be an AICTE approved institution and registered as a not-for-profit entity;[43]
- the degree / diploma granted to students has to be recognized in the FEI home country;[44]
- the fee, quantum of student intake, admissions, entry-qualifications and conduct of courses should be as prescribed by AICTE form time to time;[45]
- the FEI has to submit a detailed project giving details regarding infrastructure facilities, facilities available for instruction, faculty, admission procedure, prescribed fee, courses, curricula, availability of requisite funds for operation for a minimum period of three years and other terms and conditions of collaboration, if any;[46]

38. See http://pib.nic.in/newsite/PrintRelease.aspx?relid=99225 (last visited on January 11, 2018).
39. See http://pib.nic.in/newsite/PrintRelease.aspx?relid=70050 (last visited on January 11, 2018).
40. See http://indiatoday.intoday.in/education/story/foreign-university-campuses-in-india/1/644180.html (last visited on January 11, 2018).
41. See AICTE Regulation for Entry and Operation of Foreign Universities/Institutions Imparting Technical Education in India, 2005, available at http://www.ispepune.org.in/PDF%20ISSUE/2007/JISPE307/2009-12-23/009.PDF (last visited on January 11, 2018).
42. Conditions for Registration, Regulation 2 of the AICTE Regulations.
43. Conditions for Registration, Regulation 1 of the AICTE Regulations.
44. Conditions for Registration, Regulation 3 of the AICTE Regulations.
45. Conditions for Registration, Regulation 9 of the AICTE Regulations.
46. Procedure for Registration, Regulation 2 of the AICTE Regulations.

- the FEI is responsible for obtaining accreditation from the National Board of Accreditation after two batches have passed out;[47]
- a performance guarantee fee is required to be paid at the time of seeking registration;[48]
- franchise arrangements are not permitted.[49]

Further, as per the AICTE (Grant of Approvals for Technical Institutions) Regulations, 2016, prior approval of AICTE is required for collaboration and twinning programme between Indian and foreign universities/institutions in the field of technical education, research and training.[50]

II. UGC Regulations 2016[51]

The UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations, 2016 (**"UGC Regulations 2016"**) allows FEIs to collaborate with Indian educational institutions (other than technical institutions) upon obtaining approval from the UGC.[52] Approval is granted for two cycles of the minimum duration of the degree programmes covered under the collaboration.[53] These regulations also cover twinning programmes whereby students may complete their course by part study in India and part study in the main campus of the FEI.[54] UGC Regulation 2016 have introduced an e-application process for seeking approvals for collaboration/twinning programmes.[55] The key conditions under this regulations include the following:

- The FEI has to be accredited in its home country with the highest grade or its equivalent by an Assessment and Accreditation Agency (**"AAA"**) in its homeland.[56] The FEI also has to abide by other conditions prescribed by the Government statutory bodies;[57]
- the Indian educational institute has to be accredited with grade not less than A or its equivalent by any AAA authorized by the UGC;[58]
- the written memorandum of understanding to be entered into between the FEI and Indian educational institute after obtaining approval of the UGC;[59]
- the FEI has to submit details about the infrastructure facilities, facilities available for instruction, faculty, specified fee, courses, curricula, availability of requisite funds for operation for a minimum period of three years and other terms and conditions of collaboration,[60] if any;
- franchise arrangements are not permitted.[61]

III. Collaboration with Institution of Eminence

As an initiative to evolve Indian institutions and universities into institutions of world class eminence, the Government, from amongst the existing government/private institutions and new institutions (from the private

47. Conditions for Registrations, Regulation 12 of the AICTE Regulations.
48. Procedure for Registrations, Regulation 5(b) of the AICTE Regulations.
49. Conditions for Registration, Regulation 1 of the AICTE Regulations.
50. Regulation 4.1 of AICTE (Grant of Approvals for Technical Institutions) Regulations, 2016, available at http://www.old.aicte-india.org/downloads/reg_2016.pdf (last visited on January 11, 2018).
51. The UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations, 2016, available at https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016-(1).pdf (last visited on January 11, 2018).
52. Regulation 1(2)(a) of the UGC Regulations 2016, available at https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016-(1).pdf (last visited on January 11, 2018).
53. Regulation 5(f) of the UGC Regulation 2016.
54. Regulation 2(m) of the UGC Regulation 2016.
55. Regulation 5(b) of the UGC Regulation 2016.
56. Regulation 3(1)(a) of the UGC Regulations 2016.
57. Regulations 3(1)(c) of the UGC Regulations 2016.
58. Regulation 3(2)(a) of the UGC Regulations 2016.
59. Regulation 4 of the UGC Regulation 2016.
60. Regulation 5(b) of the UGC Regulations 2016.
61. Regulation 6(a) of the UGC Regulations 2016.

sector) intends to establish, 20 'Institutions of Eminence' (10 public and 10 private institutes) to achieve a world class status.[62] To give effect to this proposition, the UGC has notified regulations and guidelines pertaining to the same namely, *UGC (Institutions of Eminence Deemed to be Universities) Regulations, 2017*[63] ("**Institution of Eminence Regulations, 2017**") for private institutions and *UGC (Declaration of Government Educational Institutions as Institutions of Eminence) Guidelines, 2017*[64] (**"Institution of Eminence Guidelines, 2017"**) for public institutions. Some of the key incentives under these regulations and guidelines are:

- exemption from Government approval for academic collaboration with foreign higher educational institutions ranked in top 500 in global ranking;[65]
- flexibility in admission of foreign student's subject to maximum of 30% of the strength of domestic students;[66]
- freedom to fix fees for both foreign[67] and domestic students;[68]
- freedom to offer courses within a programme, as well as to offer degrees in newer areas after approval from its governing council;[69]
- flexibility to determine course structure in terms of number of credit hours and years to take a degree[70] and in fixing curriculum and syllabus, with no UGC mandated curriculum structure;[71]
- freedom to offer online courses subject to condition that not more than 20% of the programme should be in online mode. However, certificate courses can be provided entirely through online mode;[72]
- freedom to hire foreign faculty on tenure or contract basis.[73]

Thus, once Institutes of Eminence are established, collaboration will become easier for FEIs ranked in the top 500 global rankings.

62. See https://www.ugc.ac.in/pdfnews/4523868_Press-release-IoE-final.pdf (last visited on January 11, 2018).
63. See https://www.ugc.ac.in/pdfnews/5403862_Gazette-Institutions-of-Eminence-Deemed-to-be-Universities.pdf (last visited on January 11, 2018).
64. See https://www.ugc.ac.in/pdfnews/2170800_Guidelines-for-Educational-lnstitutions-as-lnstitutions-of-Eminence-2017.pdf (last visited on January 11, 2018).
65. Clause 6.1 (j) of the Institution of Eminence Guidelines, 2017.
66. Clause 6.1 (a) of the Institution of Eminence Guidelines, 2017.
67. Clause 6.1(b) of the Institution of Eminence Guidelines, 2017.
68. Clause 6.1 (c) of the Institution of Eminence Guidelines, 2017.
69. Clause 6.1 (d) of the Institution of Eminence Guidelines, 2017.
70. Clause 6.1 (e) of the Institution of Eminence Guidelines, 2017.
71. Clause 6.1 (f) of the Institution of Eminence Guidelines, 2017.
72. Clause 6.1 (g) of the Institution of Eminence Guidelines, 2017.
73. Clause 6.1 (m) of the Institution of Eminence Guidelines, 2017.

3. Structures commonly adopted by FEIs operating in the unregulated sector

In light of the various regulatory restrictions, FEIs seem to be focusing on the unregulated segments of the higher education sector to avoid regulatory hassles. Therefore, FEIs, in India offer programmes which result in grant of certificate of completion (instead of a degree or diploma). If the programmes are offered from outside India (for instance online mode) then degrees or diplomas are also sometimes issued to the students, depending on the nature of the programme. The validity and acceptance of such degrees in India remain a grey area under existing Indian regulations. Further, some states, depending on the nature of course and duration, regulate certificate programmes as well. Hence, carefully drafting the agreements, to be in sync with the regulations, is critical from a structuring perspective.

Some of the business models commonly adopted are:

I. License Arrangement

As FEIs are not allowed to open a campus, or conduct regulated educational programmes independently in India, they enter into license arrangement with Indian educational institutions. Under such an arrangement, the FEIs usually license brand name, curriculum, know-how etc. to the Indian educational institute. Such a license can be granted directly by the FEI to the Indian educational institute, from outside India under an agreement. If the FEI is interested in an India presence, it can even set up an Indian centre (through a private limited company), which offers a license to an Indian educational institute. The Indian educational institute then ends up offering the programmes to students in India. Typically, a certificate of completion is awarded to students at the end of the programme which is usually co-branded in the name of the FEI and Indian educational institute. It is important to note that this structure should be in the nature of a pure licensing arrangement and the FEI should not award any degree or diploma to students in India. Otherwise, the programme may fall under the purview of the regulated sector. Such an arrangement is a win–win for all as (i) the FEIs benefits from the license fee and goodwill generated because of its name being recognized in the Indian market; (ii) the Indian educational institute benefits from the license of curriculum and brand name of the FEI, which enable them to attract students to their institute; and (iii) the students get access to the curriculum and teaching methods of FEI in India itself, thus saving on costs.

II. Services Arrangement

In addition to granting a license of the brand, curriculum etc., FEIs may enter into services arrangement with the Indian educational institutes. Under such an arrangement, the FEI may provide services such as advising on standards for evaluation of students, qualification and recruitment of teachers, training teachers, advertising, inputs on infrastructure facilities etc. At times, FEIs also send their teacher and staff to the Indian educational institutes for teacher / student training programmes. The FEIs benefits from such an arrangement as it is able to exercise control over the curriculum, standard of education offered etc. Further, the FEI also earns from the service fee (in addition to license fee). The Indian educational institute benefits from the expertise and experience of the FEIs.

III. Online Programmes

India does not have any specific regulation governing offering of educational courses / programmes through online medium (only) as of date. While such courses usually award certificate of completion to the successful candidate at the end of the course, some even award a degree from outside India for programmes completed via the online mode. Some of these courses are also self-paced and flexible with programme timing, schedule etc., resulting in higher enrollment ratio. Further, some programmes are highly interactive, and provide for online tutors and access to e-libraries as well. Resultantly, recent trends indicate that such online certification programmes are gaining popularity day by day. Generally, no regulations apply to certification courses. Sometimes, depending on the nature of the course or programme offered, certain sector specific regulations may apply.

4. Important Considerations for setting up an entity in India

FEIs looking to explore the Indian market (for instance by providing training, certificate or corporate executive programmes, or similar programmes etc.) may consider the following options for setting up presence in India:

I. Setting up a liaison office ("LO")

LO is an extension of a foreign company and is not a separate legal entity. A foreign company can set up an LO only after meeting certain eligibility criteria and obtaining an approval from the Reserve Bank of India (**"RBI"**). Further, there are limitations on the extent of activities that can be undertaken by LOs. It can only undertake activities which are in the nature of business development, liaising, public relations, etc., i.e., activities which do not involve actual income-generating activities, but are merely preparatory and auxiliary in nature.

It is generally tax efficient (so long as the LO's activities are limited to activities permissible under the exchange control framework, for example, general business promotion and not core business / revenue earning activities).

II. Setting up a branch office ("BO")

Like LO, a BO is also an extension of a foreign company and is not a separate legal entity and needs to meet certain eligibility criteria and obtain approval from RBI for set-up. A BO can undertake a wider range of activities including business / actual income-generating activities as compared to a LO, though there are certain limitations.

A BO is prima facie, considered a permanent establishment (**"PE"**) of the foreign company in India. Therefore, the net income of the foreign company, to the extent attributable to the PE, could be taxable in India at the rate of 40%.

III. Incorporating a private limited company

A company is a separate legal entity and is not an extension of its parent entity. Therefore, it ring-fences potential liabilities (including business-related liabilities). There are no general limitations on the activities that can be undertaken by a company. Unlike a BO or LO, incorporation of a subsidiary (including a wholly owned subsidiary) is permitted under the automatic route and does not require approval from an exchange control perspective.

A subsidiary usually does not constitute a PE and hence reduces tax risks for the foreign company and is usually preferred if activities in India are to be scaled up. However, it is to be noted that repatriation of income and capital of the subsidiary (especially, dividend payments and buyback of shares) involves significant tax implications. This becomes particularly important as investment in debt instruments (and consequently repatriation of income by way of interest) is restricted under exchange control regulations. Further, services availed by the subsidiary from offshore group entities would be subject to transfer pricing compliances (and consequently, the consideration paid for such services cannot exceed the arms' length price).

5. Important considerations from legal and commercial perspective

While doing business in India, FEIs should insist on robust documentation to capture the commercial understanding of the parties. Further, since this sector is heavily regulated, the laws vary from state to state, and keep evolving. It is also important to ensure that the agreements are in line with the law of the land.

Some key contractual clauses are:

I. Intellectual Property ("IP") Rights

When IP is licensed by FEIs, terms of the license should be properly documented. At times, FEIs share their brand usage guidelines with the Indian educational institutes to specify the manner in which the brand name and trade mark can be used by the Indian entity. Further, it should also be specified that all goodwill emanating from the use of the mark in India will accrue to the benefit of the FEI. Provisions to deter misuse / infringement of IP should also be included, Further, manner of usage of IP / cessation of usage of IP after expiry or termination of agreement should be clearly captured in the document as well. There are also certain local law requirements which should be borne in mind, from an enforcement perspective. For instance, there are certain nuances under the Indian Copyright Act, 1957 from a copyright licensing (curriculum, marketing material etc.), perspective (for example, term of the license / assignment is deemed to be 5 years and territory is deemed to only be India unless parties agree otherwise). These nuances should be borne in mind while structuring a licensing deal.

II. Exclusivity

If FEIs desire that the Indian contracting entity should not engage in a business arrangement for offering similar courses with another FEI, then clauses on exclusivity should be well documented in the agreement.

III. Protection from potential claims from regulatory and tax authorities

Contractual provisions outlining whether consideration payable under contract is gross / net of taxes, tax indemnities and safeguards in case of any claims raised by regulatory or tax authorities, etc., are important and should be negotiated and documented appropriately. Further, FEIs may also want to include clauses placing obligations on Indian educational institute to inform FEIs about the regulatory approvals (if any) required, and to assist the FEI if any obligation under local law needs to be discharged by them.

IV. Dispute resolution

Parties are usually free to decide upon the governing law and dispute resolution mechanism to be adopted in a contract. However, judgments of foreign courts and awards of foreign seated arbitrators are enforceable in India only if such country is notified as a reciprocating country in India. Hence, it becomes important to check for reciprocity between India and the foreign country before deciding on the dispute resolution mechanism.

6. Important considerations from an Indian tax perspective[74]

I. License of trademark, curriculum, software, know-how, etc.[74]

In case of a licensing arrangement (as explained earlier), the consideration payable under the license agreement may be taxable as royalty at 10% on a gross basis. It may be noted that payments which are normally not considered 'royalty' may be treated as 'royalty' for the purposes of the Indian income tax law, which defines the term in very wide terms. For example, the definition includes consideration paid for limited license of off-the-shelf computer software, even if the licensee is not given any right to commercially exploit the underlying IP. However, it may be possible to avail relief from such taxation under an applicable tax treaty.

II. Providing services

The consideration paid to FEIs by Indian educational institutions for services rendered by the FEIs may be taxable as fees for technical services (**"FTS"**) at 10% on a gross basis. However, under several Indian tax treaties (including the treaty with the US), consideration for services qualifies as FTS only where the services enable the service recipient to apply the underlying technology independently. Therefore, if payment for services do not constitute FTS, they would not be taxable in India unless the entity has a PE in India. Further, under treaties with some countries (for e.g., US and Singapore), consideration paid for teaching in or by an educational institution is also excluded from the purview of FTS.

III. 'Business connection' in India

If a FEI is considered to have a 'business connection' in India, its net income, to the extent attributable to such 'business connection' may be taxable in India at 40%.[75] 'Business connection' is the corresponding domestic law concept of a PE. Its ambit is generally wider than the ambit of PE as defined under tax treaties.

Further, even if a FEI enjoys tax-exempt status under its domestic laws, generally it may not be able to claim any tax exemption/ charitable status under Indian domestic tax laws except if it obtains an approval or registration from the prescribed authorities and fulfils prescribed conditions. Therefore, it may be key to avail relief under tax treaties. In the context of Indian educational institutions, FEIs may find it difficult to claim tax treaty relief if they are set up as a fiscally transparent entity (like a partnership, trust, or LLCs), etc. However, tax-exempt entities (for example, 501(c)(3) exempt entities in the US) should normally be entitled to relief if they are taxable in the absence of such exemption / upon not satisfying the conditions applicable to such exemption.

Some other important consideration from a tax perspective include applicability of goods and services tax (**"GST"**) liability at the rate of 18%[76] on consideration paid by Indian entities for services rendered by FEIs,[77] personal taxation of faculty or other employee visiting

74. All income tax rates mentioned in this paper are exclusive of surcharge and cess; in case of non-resident companies, surcharge of 5%/ 2% is applicable on the income-tax if their total taxable income is in excess of INR 100 million (about USD 1.67 million) / in excess of INR 10 million (about USD 0.17 million) but less than INR 100 million (about USD 1.67 million) respectively; education and higher education cess of 3% (cumulative) is applicable on the total of the income-tax and surcharge.

75. Exclusive of applicable surcharge and cess.

76. Subject to exemptions available depending upon the satisfaction of conditions laid.

77. Notification 8/2017 - Integrated Tax (Rate), available at https://cbec-gst.gov.in/pdf/integrated-tax-rate/Notification8-IGST.pdf (last visited on January 11, 2018).

India, risk of collaboration arrangements constituting an 'association of persons' (**"AOP"**) between the FEI and Indian educational institutes. An AOP is a separate taxable entity and is considered to be resident in India even if a part of its control and management is situated in India. For example, in case of collaborations between an FEI and an Indian educational institution where the FEI provides course content, faculty training, etc. and the Indian educational institution is responsible with respect to infrastructure and other on-ground activities, there is a risk that both entities may jointly be treated as an AOP (depending on the nature of relationship between the entities). As the Indian educational institution is resident in India, such an AOP would also be treated as a resident of India. AOP classification could give to significant exposure for FEI as AOPs resident in India are taxable on its worldwide income in India.

Further, the Government of India introduced the Equalisation Levy (**"Levy"**) in the year 2016. The Levy has been introduced to achieve the following two objectives:

- equalizing the playing field between resident service providers who pay income taxes in India and non-resident service providers who do not pay taxes in India;
- taxing the untaxed income of non-resident service providers who do not have a physical presence in India.

The Levy currently imposes a 6% tax *"on consideration received or receivable for any on consideration received or receivable for any specified services" which currently includes "online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement"*. As of now, the Levy is only applicable on online advertising industry. However, in 2016 the Government released the Report of E-commerce Committee on Taxation of E-commerce (**"Report"**). The Report suggested including several other services under the Levy. One such service being *use of digital platforms for sale of goods and services; and online software applications accessed or downloaded through internet*. If the same is introduced, it can affect the ed-tech sector and tax at the rate of 6-8% may be applicable on non-residents providing services through digital platforms.

7. Conclusion

Although, Indian education sector has certain regulatory hurdles and challenges, it offers a great opportunity for FEIs and investors. With foresight and strategic planning, taking into account legal, regulatory and tax considerations in dealing with these issues, FEIs interested in investing in education can overcome these challenges and generate favorable returns.

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At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

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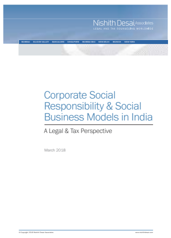

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Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

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